

UNITED STATES COURT OF MILITARY COMMISSION REVIEW

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

CMCR CASE NO. 07-001

***RULING ON MOTION TO
DISCLOSE AND ADMISSION OF
FOUR BRIEFS***

DATE: SEPTEMBER 12, 2007

Upon review and consideration of the following documents filed with the Court on the dates indicated: (1) Defense Motion for a Stay and for Judicial Disclosure, August 23, 2007; (2) Government Motion for Leave to File Supplemental Authority, August 29, 2007; (3) Government Supplemental Brief, August 31, 2007; (4) Government Reply to *Amicus* Brief, August 31, 2007; and (5) *Amicus* Motion to Admit Response and for oral argument, and *Amicus* Response to Government's Reply Brief, September 10, 2007, the Court ORDERS:

1. On August 24, 2007, the Court DENIED by e-mail the request for a stay. The Court GRANTED the Defense Motion for Judicial Disclosure. On reconsideration the Defense Motion for Judicial Disclosure is GRANTED to the extent indicated in the attached Disclosure.
2. The Defense Motion for Judicial Disclosure concerning the communications with the Office of Military Commissions is DENIED to the extent it exceeds the disclosure in the Attachment.

(a) Judge Rolph's communications with Office of Military Commissions (OMC) attorneys in 2002-2004 regarding policies and procedures fall under Exemption 5 of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(5). *See Nat'l Inst. of Military Justice v. Dep't of Def.*, 404 F.Supp.2d 325, 342-348 (D.D.C. 2005). The Department of Defense may or may not choose to invoke the deliberative privilege; however, the Court will not order the release of the documents unless they are clearly relevant to recusal or disqualification of Judge Rolph.

(b) The Court has examined *ex parte* Judge Rolph's communications from and to OMC personnel. We conclude his communications do not show bias and are not relevant to recusal or disqualification. A copy of the documents is filed with the

Chief Clerk under seal. The Court notes that some communications reflect his views on military commission law in 2002 to 2004; however, those views were stated well before enactment of the Military Commissions Act.

(c) Military judges, like other federal judges are encouraged to provide their views on the law, and to suggest changes in the law. For example, the U.S. Supreme Court administers five standing Advisory Committees of the Judicial Conference. These Advisory Committees are respectively responsible for drafting proposed amendments to the Federal Rules of Civil Procedure, Federal Rules of Criminal, Civil Procedure, Bankruptcy Procedure, Appellate Procedure, and Federal Rules of Evidence. These committees include judges, representatives from the United States Department of Justice, law professors, and practicing attorneys. The Advisory Committees, through the Standing Committee on Rules of Practice and Procedure, submits proposed rules to the Judicial Conference, which recommends them to the Supreme Court for approval. Explanatory notes of the drafting Advisory Committee are published along with the final adopted rules, and are frequently used as an authority on the interpretation of the rules. Judges are not disqualified from ruling in cases involving those same Rules.

In *Baker & Hostetler v. United States*, 471 F.3d 1355, 1357-1358 (D.C. App. 2006) the Court determined recusal was inappropriate under 28 U.S.C. § 455(b)(3) explaining:

[J]udges who previously participated in policy matters and provided policy advice in government do not ordinarily recuse in litigation involving those policy issues. That principle was exemplified recently by Justice Breyer's participation in consideration of the constitutionality of the Sentencing Guidelines after serving as a member of the Sentencing Commission that helped draft the Guidelines. *See United States v. Booker*, 543 U.S. 220 (2005); *see also Laird v. Tatum*, 409 U.S. 824, 839 (1972) (Rehnquist, J.) (declining to recuse); *id.* at 831. (“[N]one of the former Justices of this Court since 1911 have followed a practice of disqualifying themselves in cases involving points of law with respect to which they had . . . formulated policy prior to ascending to the bench.”); *id.* (describing how Justice Black sat on cases assessing the constitutionality of the Fair Labor Standards Act after being one of its principal authors while a Senator); *id.* at 831-32 (describing how Justice Frankfurter sat on a case interpreting the scope of the Norris-LaGuardia Act after playing an important role in drafting it); *id.* at 832 (describing how Chief Justice Vinson sat on cases involving legislation he helped draft while in the House of Representatives); *cf. Carter v. West Publ'g Co.*, No. 99-11959-EE, 1999 U.S. App. LEXIS 38480, 1999 WL 992997 at * 9 (11th Cir. Nov. 1, 1999) (Tjoflat, J.) (“Courts have uniformly rejected the notion that a judge's previous advocacy for a legal, constitutional, or policy position

is a bar to adjudicating a case, even when that position is directly implicated in the case before the court.”) (citations omitted).

See also United States v. Giordano, 442 F.3d 30, 48 (2d Cir. 2006) (holding a judge’s prior authorization of a wiretap does not require subsequent recusal from ruling on the admissibility of evidence gathered through the wiretap); *Buell v. Mitchell*, 274 F.3d 337, 347 (6th Cir. 2001) (judge who, as legislator, sponsored or voted for legislation implementing or favoring death penalty is not presumed to be disqualified from reviewing capital cases as judge).

(d) In conclusion, the requested e-mails and documents are not relevant to disqualification or recusal of Judge Rolph. They do not constitute *ex parte* communications because, when the communications were made in 2002-2004, Judge Rolph was not assigned to the U.S. Court of Military Commission Review, and the accused was not charged and referred to trial by military commission.

3. The Court will ADMIT and CONSIDER the following documents: (1) Government Motion to File Supplemental Authority, August 29, 2007; (2) Government Supplemental Brief, August 31, 2007; (3) Government Reply to *Amicus* Brief, August 31, 2007.
4. The *Amicus* Motion to Admit the *Amicus* Response to Government’s Reply Brief, and for oral argument on the same, September 10, 2007, is DENIED.

//Signed//

DAVID R. FRANCIS
Judge

Attached: Disclosure, Deputy Chief Judge Rolph, September 12, 2007

Disclosure

I located 15 e-mails that I received or sent from October 28, 2002, to June 24, 2004, to persons assigned to the Office of Military Commissions (OMC). I provided my paper file of military commission materials (mostly law review articles, news and magazine articles, some briefing slides and court filings) to another Judge Advocate in 2005. To the best of my information and belief, that file was destroyed several months ago.

The 2002 to 2004 OMC e-mails addressed a book, law review articles, possible trial procedures, news developments, and exchanged personal greetings. None of the e-mails mentioned the accused in this case. Some of the e-mails or their attachments pertain to internal deliberations of the OMC that were disclosed to me because OMC personnel sought my legal advice concerning military commission trial policies and procedures. I provided such legal advice while acting as a Department of the Navy employee, attorney and military justice expert. It would be inappropriate for me to disclose these communications unless they were relevant to my disqualification or recusal.

On June 29, 2006, the U.S. Supreme Court decided *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006), invalidating those trial procedures that were in effect in 2002-2004. The Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (MCA), which the President signed into law on October 17, 2006, as well as the subsequently approved *Military Commissions Manual* and Military Commissions Regulation provided the new procedures that are applicable to *United States v. Khadr*.

None of the e-mails or their attachments mention the case of *United States v. Khadr*, and Mr. Khadr was not charged until 2005. The e-mails pertain to general trial policies or procedures for military commissions that have been superseded by judicial decision, legislation, and Department of Defense implementation of the 2006 legislation. The e-mails did not address individual cases. The e-mails involve OMC personnel who no longer work at OMC.

I conclude that no purpose is served through disclosure of my e-mail correspondence. At the time I sent or received the e-mails, I was a trial judge in the Department of the Navy, and not a member of the U.S. Court of Military Commission Review. Moreover, the accused in this case was not charged under the former Military Commissions regime in 2002-2004 when these e-mails were sent and received. In sum, the e-mails are not relevant to the current litigation in *United States v. Khadr*.

//SIGNED//

September 12, 2007

John W. Rolph
Deputy Chief Judge

DATE